Supreme Court, U.S.
FILED
NOV 17 1986
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 86-639

In The
Supreme Court of the United States
October Term, 1986

AMBROSE DAIGLE,
Petitioner,

v.

GULF STATES UTILITIES COMPANY; IBEW LOCAL 2286; et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF RESPONDENTS, GULF STATES UTILITIES COMPANY, JIMMY SMITH AND LARRY WENZELL, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBERT J. HAMBRIGHT*
JAMES W. HAMBRIGHT
ORGAIN, BELL & TUCKER
470 Orleans Street
Beaumont, TX 77701
(409) 838-6412
WILLIAM E. HEANER, JR.
GULF STATES UTILITIES COMPANY
P. O. Box 2951
Beaumont, TX 77704
(409) 839-2140
Attorneys for Respondents, Gulf States Utilities Company, Jimmy Smith and Larry Wenzell
*Attorney of Record

November 12, 1986

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

20pp

QUESTIONS PRESENTED

1. Whether the six-month limitations period made applicable to hybrid Section 301/fair representation suits by *DelCostello v. International Broth. of Teamsters*, 462 U.S. 151 (1983), should be tolled during the pendency of unfair labor practice proceedings before the National Labor Relations Board.

2. Whether the *DelCostello* six-month limitations period should bar as untimely a hybrid Section 301/fair representation suit filed nine months after the accrual of the alleged cause of action and two months after the *DelCostello* decision.

3. Whether alleged discrimination against an individual on account of his economic views and activities is actionable under 42 U.S.C. § 1981; and whether an alleged conspiracy between an employer and a union to deny an individual the "right to work," and to defeat his NLRB charge and claim for unemployment benefits, is actionable under 42 U.S.C. § 1985.

PARTIES TO THE PROCEEDING BELOW

Petitioner is Ambrose Daigle (Daigle).

Respondents are Gulf States Utilities Company (GSU); International Brotherhood of Electrical Workers, Local Union 2286 (IBEW); Jimmy Smith; Larry Wenzell; and the Texas Employment Commission (TEC).*

---

*The TEC is listed as a respondent in Daigle's Petition (*See* Petition at ii); however, Daigle has not petitioned for review of the dismissal of his unemployment benefits claim against GSU and TEC.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING BELOW ii

INDEX OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 4

CONCLUSION 11

APPENDIX

SECTION 301 OF THE LABOR MANAGEMENT RELATIONS ACT, 29 U.S.C. § 185 ..... App. 1

INDEX OF AUTHORITIES

Pages

CASES

Aarsvold v. Greyhound Lines, Inc., 724 F.2d 72 (8th Cir. 1983), *cert. denied*, — U.S. —, 104 S.Ct. 3538 (1984) 4

Adkins v. Intern. Union of Elec., Radio and Mach., 769 F.2d 330 (6th Cir. 1985) 4

Assad v. Mount Sinai Hosp., 725 F.2d 837 (2d Cir. 1984) 7

Chevron Oil Company v. Huson, 404 U.S. 97 (1971) 6, 8

DelCostello v. International Broth. of Teamsters, 462 U.S. 151 (1983) 3, 4, 6, 7, 8

Edwards v. Sea-Land Service, Inc., 720 F.2d 857 (5th Cir. 1983) 6, 7

Edwards v. Teamsters Local Union 36, 719 F.2d 1036 (9th Cir. 1983), *cert. denied*, — U.S. —, 104 S.Ct. 1599 (1984) 8

Ernst v. Indiana Bell Telephone Co., Inc., 717 F.2d 1036 (7th Cir. 1983), *cert. denied*, — U.S. —, 104 S.Ct. 707 (1984) 7

Graves v. Smith's Transfer Corp., 736 F.2d 819 (1st Cir. 1984) 7

Gray v. Amalgamated Meat Cutters Local 540, 736 F.2d 1055 (5th Cir. 1984) 7

International U. of Elec. Wkrs. v Robbins & Myers, 429 U.S. 229 (1976) 5

Johnson v. Railway Express Agency, 421 U.S. 454 (1975) 5

Jones v. Consolidated Freightways Corp., 776 F.2d 1458 (10th Cir. 1985) 8

Kolomick v. Steelworkers of America Dist. 8, 762 F.2d 354 (4th Cir. 1985) 4

INDEX OF AUTHORITIES—Continued

Pages

Lincoln v. Dist. 9 of Intern. Ass'n of Machinists, 723 F.2d 627 (8th Cir. 1983) 7

Murray v. Branch Motor Exp. Co., 723 F.2d 1146 (4th Cir. 1983), *cert. denied*, — U.S. —, 105 S.Ct. 292 (1984) 7

Perez v. Dana Corp., Parish Frame Div., 718 F.2d 581 (3d Cir. 1983) 7

Rogers v. Lockheed-Georgia Co., 720 F.2d 1247 (11th Cir. 1983), *cert. denied*, — U.S. —, 105 S.Ct. 292 (1984) 7

Saville v. Westinghouse Elec Corp., 760 F.2d 261 (3d Cir. 1985), *Mem., cert. denied*, — U.S. —, 106 S.Ct. 280 (1985) 8

Smith v. General Motors Corp., 747 F.2d 372 (6th Cir. 1984) (en banc) 8

United Broth. of Carpenters & Joiners v. Scott, 463 U.S. 825 (1983) 10

Vaca v. Sipes, 386 U.S. 171 (1967) 4

Welyczko v. U.S. Air, Inc., 733 F.2d 239 (2d Cir. 1984), *cert. denied*, — U.S. —, 105 S.Ct. 512 (1984) 8

Wilhite v. Greyhound Lines, 760 F.2d 278 (9th Cir. 1985), *Mem., cert. denied sub nom., Greyhound Lines, Inc. v. Wilhite*, — U.S. —, 106 S.Ct. 280 (1985) 8

STATUTES

29 U.S.C. § 185 2

42 U.S.C. § 1981 ..... 3, 9

42 U.S.C. § 1985 ..... 9, 10

42 U.S.C. § 2000e *et seq.* 5

No. 86-639

In The

Supreme Court of the United States

October Term, 1986

AMBROSE DAIGLE,

Petitioner,

v.

GULF STATES UTILITIES COMPANY; IBEW LOCAL 2286; et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF RESPONDENTS, GULF STATES UTILITIES COMPANY, JIMMY SMITH AND LARRY WENZELL, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the three-judge panel of the Court of Appeals is reported at 794 F.2d 974. The memorandum opinion of the trial court was not published (E.D. Tex., Civil Action No. B-83-704-CA). The opinions of the lower courts are reproduced in Appendix A of the Petition for Writ of Certiorari. Hereinafter, references designated as "App. —" are to Appendices of the Petition.

JURISDICTION

The jurisdictional requisites are set forth in the Petition.

STATUTORY PROVISIONS INVOLVED

Virtually all of the relevant (and several irrelevant) statutory provisions are cited and reproduced in the Petition (App. B). Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, is cited and reproduced in the Appendix to this Brief.

—o—

STATEMENT OF THE CASE

Petitioner Ambrose Daigle's employment with defendant Gulf States Utilities Company (GSU) was terminated on October 12, 1982, as a result of his violation of a work rule (App. A., pp. 2a, 15a). At the time of his discharge, Daigle was a member of a collective bargaining unit of GSU employees who are represented by the International Brotherhood of Electrical Workers, Local Union 2286 (IBEW) (App. A., pp. 2a, 15a). Daigle applied to the IBEW and the National Labor Relations Board (NLRB) for assistance in contesting his discharge (App. A., pp. 2a, 17a, 19a). After an investigation, IBEW decided not to file a grievance on Daigle's behalf and notified him of such decision by letter dated November 19, 1982 (App. A., pp. 2a, 17a). On November 17, 1982, the NLRB notified Daigle that it refused to issue a complaint, and the final appeal from such refusal was denied on May 23, 1983 (App. A., p. 2a).

The present lawsuit was filed on August 8, 1983 (App. A., pp. 2a, 17a-18a), approximately ten months after the termination of Daigle's employment and approximately nine months after IBEW declined to file a grievance on his behalf. Daigle brought suit under Section 301 of the Labor Management Relations Act., 29 U.S.C. § 185, alleging that GSU breached the collective bargaining agreement by

discharging him and that IBEW violated its duty of fair representation to him by not taking his case through the grievance and arbitration machinery under the agreement. Further, he brought suit under "Title 42 U.S.C. Section 1981 et seq. . . ." alleging that GSU, IBEW, and GSU managerial personnel Jimmy Smith and Larry Wenzell, conspired to deprive him of the "right to work," and to defeat his NLRB charge and claim for unemployment benefits. In another count of his complaint, he brought suit against GSU and the Texas Employment Commission (TEC) under a state statute, seeking to overturn the TEC's decision that he had been terminated for misconduct and thus was disqualified to receive unemployment benefits. The trial court dismissed Daigle's complaint for the reasons set forth in its memorandum opinion (App. A., pp. 15a-27a).

Judge Jerre Williams, writing for a panel of the fifth circuit, affirmed the trial court's dismissal of Daigle's civil rights and unemployment benefits claims, but reversed the trial court's dismissal of Daigle's Section 301/fair representation claim and remanded such portion of the case for further consideration. Although Daigle's complaint states that the applicable collective bargaining agreement provides for binding arbitration of grievances arising thereunder, the actual labor agreement itself does not appear in the record. Under Judge William's opinion, the trial court is directed to interpret such agreement; if resort to the applicable grievance and arbitration machinery was mandatory, Daigle's breach of contract claim is time-barred under the limitations period made applicable to hybrid Section 301/fair representation suits by *DelCostello v. International Broth. of Teamsters*, 462 U.S. 151 (1983). On the other hand, if resort to the applicable

grievance and arbitration machinery was optional, then a longer state breach of contract limitations period would be applicable, and Daigle's suit can proceed.

Daigle has not petitioned for review of the disposition of his alleged unemployment benefits claim. The three questions presented by his Petition herein are insubstantial and do not warrant further review by this Court.

———o———

REASONS FOR DENYING THE WRIT

1. The six-month limitations period made applicable to hybrid Section 301/fair representation suits by *DelCostello v. International Broth. of Teamsters*, 462 U.S. 151 (1983), should not be tolled during the pendency of unfair labor practice proceedings before the NLRB. Daigle's contrary argument was rejected by the courts below, and further review of the question by this Court is not warranted.

An aggrieved individual need not resort to filing an unfair labor practice charge with the NLRB in order to bring a hybrid Section 301/fair representation suit, because the NLRB does not have preemptive jurisdiction over such claims in the first instance. *Vaca v. Sipes*, 386 U.S. 171, 187 (1967). That is, the filing of an NLRB charge is not a prerequisite to suit in federal court. Thus, running of the six-month period within which Daigle was required to file suit in federal court was not tolled by his decision to pursue an unfair labor practice charge before the NLRB. *See Kolomick v. Steelworkers of America, Dist. 8*, 762 F.2d 354, 356-57 (4th Cir. 1985); *Adkins v. Intern. Union of Elec., Radio and Mach.*, 769 F.2d 330, 335 (6th Cir. 1985); *Aarsvold v. Greyhound Lines, Inc.*, 724 F.2d 72, 73 (8th Cir. 1983), *cert. denied*, — U.S. —, 104 S.Ct. 3538 (1984).

In analogous labor cases, where an aggrieved individual has the advantage of separate parallel avenues of relief, the time taken to pursue one avenue of relief does not extend the limitations period applicable to the other. For example, in *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975), the Court held that the time consumed by EEOC proceedings under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, does not extend the limitations period for bringing a suit under 42 U.S.C. § 1981. The Court reasoned and held as follows:

> "Conciliation and persuasion through the administrative process, to be sure, often constitute a desirable approach to the settlement of disputes . . . We recognize, too, that the filing of a lawsuit might tend to deter efforts at conciliation . . . But these are the natural effects of the choice Congress has made available to the claimant by its conferring on him independent administrative and judicial remedies. The choice is a valuable one. Under some circumstances, the administrative route may be highly preferred over the litigatory; under others the reverse may be true. We are disinclined, in the face of congressional emphasis upon the existence and independence of the two remedies, to infer any positive preference for one over the other, without a more definite expression in the legislation Congress has enacted, as, for example, a proscription of a Section 1981 action while an EEOC claim is pending.
>
> We . . . conclude, therefore, that the remedies available under Title VII and under § 1981, although related, and although directed to most of the same ends, are separate, distinct, and independent."

Id. at 461. Similarly, in *International U. of Elec. Wkrs. v. Robbins & Myers*, 429 U.S. 229 (1976), the Court held that pursuit of a grievance under a collective bargaining agreement does not toll the period for filing a charge with EEOC under Title VII.

The result reached below is wholly consistent with prior decisions of this Court and of the courts of appeals, and does not warrant review by this Court. Suspension of the *DelCostello* six-month limitations period for the time consumed by NLRB proceedings, which can stretch from a few weeks to a few years, would be contrary to federal policy in favor of the "relatively rapid final resolution of industrial disputes," which in large measure caused adoption of the limitations period in the first place. *DelCostello*, 462 U.S. at 169.

2. The *DelCostello* six-month limitations period should bar as untimely a hybrid Section 301/fair representation suit filed nine months after the accrual of the alleged cause of action and two months after the *DelCostello* case was decided. Daigle's contrary argument was rejected by the lower courts, and further review of the question by this Court is unnecessary.

Several years ago, the fifth circuit decided that the *DelCostello* limitations period should be applied retroactively to cases pending on the date of such decision. *See Edwards v. Sea-Land Service, Inc.*, 720 F.2d 857, 859 (5th Cir. 1983). The court painstakingly analyzed the question within the framework of the factors to be used in determining when retroactive effect should be given to a new judicial decision affecting a limitations period, as set forth in *Chevron Oil Company v. Huson*, 404 U.S. 97 (1971). *See Edwards v. Sea-Land Service, Inc.*, 720 F.2d 857, 860-63 (5th Cir. 1983). The court held that *DelCostello* did not represent a "clear break" with the circuit's prior precedent regarding the limitations period applicable to Section 301 breach of contract suits. *Id.* at 861. Further, while the court held that *DelCostello* did represent a break with the circuit's past precedent regarding the limitations period applicable to a fair representation claim,

Id. at 861, equitable consideration of Edwards' purported reliance on such past precedent was not deemed warranted because Edwards had never even cited such precedent to the court. *Id.* at 862. Finally, the court concluded that retroactive application of the *DelCostello* rule would advance federal labor law policy favoring uniformity and the prompt resolution of industrial disputes. *Id.* at 861-62. The detailed analysis in *Edwards* was intended to resolve the retroactivity question in the fifth circuit once and for all. *Gray v. Amalgamated Meat Cutters Local 540*, 736 F.2d 1055, 1055 (5th Cir. 1984). While Daigle continues to cite *Edwards* for the proposition that he "relied" on past precedent in waiting too long to file his lawsuit (*see e.g.* Petition at 6), he has never cited the fair representation cases identified *in Edwards*, from which *DelCostello* was said to have departed.

A clear majority of the other circuit courts of appeals have applied the *DelCostello* six-month limitations period retroactively. *See Graves v. Smith's Transfer Corp.*, 736 F.2d 819, 820-22 (1st Cir. 1984); *Murray v. Branch Motor Exp. Co.*, 723 F.2d 1146, 1148 (4th Cir. 1983), *cert. denied*, — U.S. —, 105 S.Ct. 292 (1984); *Lincoln v. Dist. 9 of Intern. Ass'n of Machinists*, 723 F.2d 627, 629-30 (8th Cir. 1983); *Perez v. Dana Corp., Parish Frame Div.*, 718 F.2d 581, 588 (3d Cir. 1983); *Rogers v. Lockheed-Georgia Co.*, 720 F.2d 1247, 1249-50 (11th Cir. 1983), *cert. denied*, — U.S. —, 105 S.Ct. 292 (1984); *Ernst v. Indiana Bell Telephone Co., Inc.*, 717 F.2d 1036, 1038 (7th Cir. 1983), *cert. denied*, — U.S. —, 104 S.Ct. 707 (1984); *Assad v. Mount Sinai Hosp.*, 725 F.2d 837, 838 (2d Cir. 1984). Indeed, the sixth and second circuits have even refused to analyze the question in terms of the policy factors set out

in *Chevron Oil Company v. Huson*, 404 U.S. 97 (1971), concluding that this Court implicitly held in *DelCostello* that the limitations period should be applied retroactively by barring the claim that was in front of the Court. *Smith v. General Motors Corp.*, 747 F.2d 372, 375 (6th Cir. 1984) (en banc); *Welyczko v. U.S. Air, Inc.*, 733 F.2d 239, 241 (2d Cir. 1984), *cert. denied*, — U.S. —, 105 S.Ct. 512 (1984).

It should be noted that the ninth and tenth circuits have held that *Delcostello* should not be applied retroactively. *Edwards v. Teamsters Local Union 36*, 719 F.2d 1036, 1041 (9th Cir. 1983), *cert. denied*, — U.S. —, 104 S.Ct. 1599 (1984); *Jones v. Consolidated Freightways Corp.*, 776 F.2d 1458, 1463 (10th Cir. 1985). However, both the ninth and tenth circuit decisions involved circumstances inapposite to the case at bar, and thus do not present a conflict suitable for resolution by this Court. Moreover, to the extent there is a conflict of authority between the circuit courts, this Court previously has declined to resolve it. *See Wilhite v. Greyhound Lines*, 760 F.2d 278 (9th Cir. 1985), *Mem., cert. denied sub nom., Greyhound Lines, Inc. v. Wilhite*, — U.S. —, 106 S.Ct. 280 (1985) (White, J., dissenting); *Saville v. Westinghouse Elec. Corp.*, 760 F.2d 261 (3d Cir. 1985), *Mem., cert. denied*, — U.S. —, 106 S.Ct. 280 (1985) (White, J., dissenting).

The result reached by the lower courts in the case at bar comports with the letter and spirit of *DelCostello*. It would be a useless exercise to grant Daigle's Petition, and thus prolong this litigation, only to affirm the lower courts and reiterate the principle that federal labor law policy strongly favors the prompt and uniform resolution of industrial disputes.

3. The courts below properly concluded that alleged discrimination against an individual on account of his economic views and activities is not actionable under 42 U.S.C. § 1981; and that an alleged conspiracy between an employer and a union to deprive an individual of the "right to work," and to defeat his NLRB charge and claim for unemployment benefits, is not actionable under 42 U.S.C. § 1985. Daigle's contrary arguments do not require serious consideration by the Court.

Section 1981, the forerunner of which was first enacted immediately following the Civil War, was designed to assure that, with respect to the enforcement of contracts, all persons were placed on an equal footing with "white persons." The parties to the case at bar have stipulated that "racial discrimination plays no part in this case." (App. A., pp. 3a, 11a, 20a fn. 7). Daigle is white. While it may no longer be proper to state that such statute is directed only toward the eradication of discrimination against black persons, the only "non-racial" areas to which Section 1981 has been extended by the courts appear limited to analogous situations such as reverse discrimination, or discrimination based on citizenship or skin color. The courts have not extended the reach of Section 1981 into such dissimilar areas as sex or religious discrimination. For the same reasons, the courts below properly concluded that Section 1981 does not reach "economic" discrimination and that the statute affords Daigle no basis for relief.

Daigle's efforts to state a cause of action under Section 1985 also must fail. Daigle's tired and worn argument that Section 1985 (3) was intended to reach alleged conspiracies motivated by differences in economic views

is clearly foreclosed by *United Broth. of Carpenters & Joiners v. Scott,* 463 U.S. 825 (1983), a case which involved conspiratorial labor violence against a non-union contractor in Port Arthur, Texas (App. A., pp. 7a-8a, 22a-23a, and authorities there cited). Further, the courts below properly determined that each of the separate clauses of Section 1985 (2) is inapplicable to the facts alleged by Daigle. The first two clauses of Section 1985 (2) do not apply, because even if there was a conspiracy to obstruct certain NLRB and TEC proceedings by the giving of what Daigle perceives to be false and misleading affidavits, the purported "obstruction of justice" of which he complains did not occur in *federal court* proceedings (App. A., pp. 8a-10a, 23a-25a, and authorities there cited). The second two clauses of Section 1985 (2) do not apply, because, according to Daigle, the alleged conspiracy to obstruct the proceedings relating to his claim for unemployment benefits was directed toward him because of his economic views and activities. Purported "conspiracies" motivated not by racial or class-based considerations, but solely by differences of opinion regarding labor economics, are not reached by the second two clauses of Section 1985 (2) (App. A., pp. 8a-10a, 23a-25a, and authorities there cited).

———o———

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

ROBERT J. HAMBRIGHT*
JAMES W. HAMBRIGHT
ORGAIN, BELL & TUCKER
470 Orleans Street
Beaumont, TX 77701
(409) 838-6412

WILLIAM E. HEANER, JR.
GULF STATES UTILITIES COMPANY
P. O. Box 2951
Beaumont, TX 77704
(409) 839-2140

Attorneys for Respondents,
Gulf States Utilities Company,
Jimmy Smith and Larry Wenzell

*Attorney of Record

November 12, 1986

APPENDIX

29 U.C.S. § 185. Suits by and against labor organizations

Venue, amount, and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

Jurisdiction

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

Service of process

(d) The service of summons, subpena [sic], or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

Determination of question of agency

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

June 23, 1947, c. 120, Title III, § 301, 61 Stat. 156.